HONOURABLE SRI G.S.SINGHVI

THE CHIEF JUSTICE

AND

HONOURABLE SRI JUSTICE

R.SUBHASH REDDY

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WRIT APPEAL No. 2577 OF 2005

Between:

Sri Rama Chander S/o B.Narasimha

… Appellant

And

Indian Bank represented by its

Manager, Barkatpura Branch,

Hyderabad and another.

… Respondents

::JUDGMENT::

Counsel for appellant : Sri B.Veerabhadra Rao

Counsel for respondents : Smt. P.Balarani

29th December, 2005

Per G.S.Singhvi, C.J.

Dissatisfied with the partial relief given by the learned Single Judge in Writ Petition No.25834 of 2005 filed by him for quashing notices dated 12-9-2005 and 15-11-2005 issued by The Indian Bank (for short 'the bank') under Sections 13 (2) and 13 (4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Act'), the appellant has filed this appeal

under Clause 15 of the Letters Patent.

The appellant claims to be the owner of house property bearing No.18-1-6, Plot No.61, Survey No.193 admeasuring 264 sq. yds. situated in Sree Ram Nagar Colony, Alwal, Secunderabad. He mortgaged this property in his capacity as guarantor in respect of the loan sanctioned by the bank in favour of M/s.Sri Ranganatha Traders. On account of the borrower's failure to repay the loan with interest, the bank initiated proceedings for recovery of the principal amount together with interest. Notice dated 22.8.2003 was issued to the appellant for repayment of the outstanding amount. The same was sent by registered post, but was returned unserved. Thereupon, a copy of the notice was affixed on the property. After about 2 years, the bank issued notice dated 12-9-2005 under Section 13(2) of the Act requiring the petitioner to repay the loan amount of Rs.6,65,789/- with further interest at the agreed rate from 1.8.2005. The appellant did not contest the notice by filing an objection under Section 13 (3A) of the Act. Therefore, the bank issued notice dated 15.11.2005 under Section 13(4) of the Act for taking possession of the property described herein above.

Faced with the threat of being deprived of his property, the appellant filed writ petition under Article 226 of the Constitution of India for quashing notices dated 12-9-2005 and 15-11-2005 by contending that the first notice was vague to the core and did not fulfill the mandatory requirement of Section 13 (3) of the Act.

The learned Single Judge declined to entertain the writ petition on the ground that the petitioner had not made any representation under Section 13 (3A) and against the notice issued under Section 13 (4), remedy of appeal was available under Section 17 of the Act.

Sri B.Veerabhadra Rao, learned counsel for the appellant fairly stated that his client had not made any representation or filed objection under Section 13(3A), but argued that his omission to do so is not sufficient to absolve the bank of its responsibility to comply with the requirement of Section 13(3) in its letter and spirit. Learned counsel emphasized that a notice issued under Section 13(2) without giving details of the amounts payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of the secured debts by the borrower should be declared as non-est. He then argued that the opportunity of making representation or filing objection envisaged under sub-section (3A) of

Section 13 cannot be treated as an empty formality by the secured creditor by omitting to disclose the details of the amount etc. Another contention of the learned counsel is that the requirement of furnishing details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor represents one of the facets of the rules of natural justice and a notice issued without complying the mandate of that section is liable to be treated as nullity.

We have given serious thought to the arguments of the learned counsel but have not felt impressed. A reading of the scheme of Section 13 read with Section 17 makes it clear that notwithstanding Sections 69 and 69A of the Transfer of Property Act, 1882, a secured creditor is entitled to initiate process for recovery of the amount payable by the borrower. Sub-section (2) of Section 13 entitles the secured creditor to issue notice of 60 days to the borrower and guarantor for repayment of the amount without the intervention of the Court or Tribunal.

Sub-section (3) of Section 13 envisages that notice issued under sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower. Sub-section (3A), which was introduced by Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 (This appears to have been done in view of the judgment of the Supreme Court in **Mardia Chemicals Limited v. Union of India**, (2004) 4 SCC 311) entitles the borrower to make representation or raise any objection against the notice issued under sub-section (2) of Section 13. This sub-section also imposes a duty on the secured creditor to consider such a representation or objection and pass a reasoned order if the same is not to be accepted.

In our opinion, the width and amplitude of sub-section (3A) of Section 13 entitles the borrower not only to question the amount specified in the notice issued under Section 13 (2), but also to question the very initiation of proceedings under the Act and the jurisdiction of the secured creditor to invoke the provisions of the Act. Therefore, if the petitioner felt aggrieved by the action initiated by the bank, then he could have filed objections under Section 13 (3A) and pleaded that the notice should be withdrawn because the same did not contain the details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor. If any such objection was raised, the bank could have either removed the grievance of the petitioner or rejected his objection by recording

reasons. However, the fact of the matter is that the petitioner neither availed the opportunity envisaged under Section 13 (3A) nor he paid the amount specified in notice dated 12-9-2005 or persuaded the borrower to repay the debt to the bank. This naturally created a situation in which the bank was compelled to take action under sub-section (4) of Section 13.

Section 17 (1) provides for remedy of appeal to the person aggrieved by any of the measures referred to in sub-section (4) of Section 13 which may be taken by the secured creditor or his authorized officer. Sub-section (3) of Section 17 empowers the Debts Recovery Tribunal, before which an appeal can be preferred under sub-section (1) thereof, to examine the facts and circumstances of the case and evidence produced by the parties and nullify the action initiated by the bank under Section 13(4) of the Act. In our opinion, the remedy of appeal available to the petitioner under Section 17 (1) is an effective alternative remedy and the learned Single Judge did not commit any error by refusing to entertain his challenge to notices dated 12-9-2005 and 15-11-2005 issued by the bank under Sections 13 (2) and 13 (4) respectively.

The Supreme Court has consistently held that the High Court should not entertain the writ petition under Article 226 of the Constitution if an effective alternative remedy is available to the petitioner. In **A.V. Venkateshwaran v. R.S. Wadhwani** the Constitutional Bench of the Supreme Court while reiterating the rule that the party who applies for the issue of a high prerogative writ should, before he approaches the Court, exhaust the other remedies open to him under the law is not one which bars the jurisdiction of the High Court to entertain the petition but is a rule evolved by the Courts for the exercise of their discretion, observed as under:

> " The wide proposition that the existence of an alternative remedy is a bar to the entertainment of a petition under Art.226 of the Constitution unless (1) there was a complete lack of jurisdiction in the officer or authority to take the action impugned, or (2) where the order prejudicial to the writ petitioner has been passed in violation of the principles of natural justice and could, therefore, be treated as void or non est and that in all other cases, Courts should not entertain petitions under Art. 226, or in any event not grant any relief to such petitioners cannot be accepted. The two exceptions to the normal rule as to the effect of the existence of an adequate alternative remedy are by no means exhaustive, and even beyond them a discretion vests in the High Court to entertain the petition and grant the petitioner relief notwithstanding the existence of an alternative remedy. The broad lines of the

general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the court, and in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the court."

In **Thansingh Nathmal v. Superintendent of Taxes** another Constitutional Bench of the Supreme Court considered the question relating to exercise of discretion by the High Court in entertaining a writ petition despite the availability of alternative remedy and held:

"The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

In **Baburam v. Zilla Parishad** the Supreme Court reiterated the rule of alternative remedy in the following words:

"When an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special

jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But, the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefor. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may therefore in exceptional cases issue a writ such as a writ of certiorari, notwithstanding the fact that the statutory remedies have not been exhausted."

Their Lordships then carved out the following two exceptions to the rule of alternative remedy:

1. where proceedings are taken before a Tribunal under a provision of law, which is ultra vires to the Constitution,

2. where the impugned order has been made in violation of the rules of natural justice.

In **Champa Lal v. I.T. Commissioner**, **J.M. & Co. v. Agricultural I.T. Officer, Assam**, **C.I.T. v. Ramendra Nath Ghosh**, **Swadeshi Cotton Mills Co. Ltd., v. Government of U.P.**, **Gujarat University v. N.U. Rajguru**, **State of H.P. v. Raja Mahendra Pal**, **L.L. Sudhakar Reddy v. State of A.P.**, **State of Bihar v. Jain Plastics & Chemicals Ltd.,**, **Harbanslal Sahnia v. Indian Oil Corporation Ltd.,**, **ABL International Ltd., v. Export Credit Guarantee Corporation of India Ltd.,** the Supreme Court applied the rule of alternative remedy in different fact situations. In **Harbanslal Sahnia**[12] (supra) the Supreme Court considered the eventualities in which the High Court can exercise under Article 226 of the Constitution of India notwithstanding the availability of alternative remedy and held:

"The rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: *i*) where the writ petition seeks enforcement of any of the fundamental rights; (*ii*) where there is failure of principles of natural justice; or (*iii*) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See ***Whirlpool Corpn.*** **v.** ***Registrar of Trade Marks {(1998) 8 SCC 1}***. The present case attracts applicability of the first two contingencies. Moreover, as

noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

In **Titaghur Paper Mills Co. Ltd. v. State of Orissa** the Supreme Court stated the rule of alternative remedy in the following words:

" Where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute alone must be availed of. Under the scheme of the Orissa Sales Tax Act, there is a hierarchy of authorities for granting redress. The petitioners had an equally efficacious alternative remedy by way of an appeal to the Prescribed Authority under sub-section (1) of Section 23, then a second appeal to the Tribunal under sub-section (3)(a) thereof, and thereafter in the event the petitioners get no relief, to have the case stated to the High Court under Section 24 of the Act. The Act provides for an adequate safeguard against an arbitrary or unjust assessment, such as right to prefer appeal under Section 23 (1) and to apply for stay of recovery under clause (a) of the second proviso to Section 13 (5). Thus the Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226.

In the present case the challenge was only to the regularity of the proceedings before the S.T.O. as also his authority to treat the gross turnover returned by the petitioners to be the taxable turnover. The impugned orders of assessment were not challenged on the ground that they were based on a provision which was ultra vires. There was no question as to jurisdiction to make the assessment. The entrustment of power to assess was not in dispute, and the authority within the limits of his power was a Tribunal for exclusive jurisdiction.

There was also no question of denial of natural justice. The petitioners were served notice of the proceedings under Rule 12 (5) of the Central Sales Tax (Orissa) Rules and Section 12 (4) of the Act. The impugned orders clearly show that the petitioners were afforded sufficient opportunity to place their case. Mere refusal by the S.T.O. to grant any further adjournment and his decision to proceed to best judgment under Rule 15 does not amount to violation of natural justice because the question of grant of any further adjournment was within the discretion of the S.T.O. and is a matter which can be properly raised only in appeal under Section 23 (1) of the Act."

In **Assistant Collector, Central Excise v. Dunlop India Ltd.** the Supreme Court referred to some earlier judgments, including the one of **Titaghur Paper Mills**

Co. Ltd. v. State of Orissa[14] (supra) and held:

> "Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."

In the case before us, the appellant has neither pleaded nor has the learned counsel argued that the provisions of the Act are ultra vires to the Constitution or that the proceedings initiated by the bank are without jurisdiction. As a matter of fact, the only substantive argument of the learned counsel is that the notice issued under Section 13(2) without complying with the requirement of Section 13(3) should be treated as nullity and after going through the notice we are convinced that this argument of the learned counsel is without substance. A reading of notice dated 12.9.2005 makes it clear that the bank had clearly identified the amount payable by the borrower. The amount specified was Rs.6,65,789/- with further interest at the agreed rate. It is not the pleaded case of the appellant that he was not aware of the terms of the agreement entered into between the borrower and the bank or that he was not aware of the amount of interest which was payable by the borrower. Therefore, it is not possible to agree with the learned counsel that notice dated 12-9-2005 is vitiated due to non-compliance of Section 13 (3).

The argument of the learned counsel that notice dated 12-9-2005 is vitiated due to the violation of the rules of natural justice sounds attractive but lacks merit. In our considered view, the appellant's failure to raise objection under Section 13(3A) militates against his plea that the notice issued under Section 13(2) is vitiated due to violation of rules of natural justice.

There is another reason for our disinclination to entertain the appellant's plea of violation of the rules of natural justice. In the writ petition, the appellant neither

pleaded nor placed on record any material to show that his cause had been prejudiced on account of the absence of the so-called material particulars in notice dated 12.9.2005. In the absence of a prima facie proof of prejudice, the learned Single Judge could not have nullified the notice only on the ground of the so-called violation of the rules of natural justice.

No other point has been argued.

For the reasons stated above, the appeal is dismissed. However, we give liberty to the appellant to avail remedy of appeal under Section 17(1) and direct that if appeal is filed within 15 days from today, then the same shall be entertained by the concerned Debts Recovery Tribunal.

G.S.SINGHVI, C.J.

29.12.2005.

R.SUBHASH REDDY, J.

VR / svs